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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

542

No. 542

ANNA M. FOUNTAIN,

Petitioner,

vs.

PAUL FILSON AND ANNA F. FILSON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WILLIAM M. AIKEN,
CHARLES A. HORSKY,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of case	2
Reasons for granting the writ	3
1. This case raises an important question of federal procedure which has not been, but should be, settled by this Court	3
2. The action of the Court of Appeals in directing entry of judgment for respondents is inconsistent with the Federal Rules of Civil Procedure and with decisions in which this Court has construed them	6
(a) The Court of Appeals has no power to direct entry of judgment for respondents	6
(b) Even if the Court of Appeals had power to direct judgment for respondents, exercise of that power was not appropriate in this case	8
Conclusion	10
Appendix (F.R.C.P. No. 56)	11

Citations

Cases:

Begnaud v. *White*, 170 F. 2d 323 (CCA 6, 1948)	7
Cone v. *West Virginia P. & P. Co.*, 330 U. S. 212 (1947)	3, 4, 6, 7
Globe Liquor Co. v. *San Roman*, 332 U. S. 571 (1948)	3, 4, 6, 7
Kennedy v. *Silas Mason Co.*, 334 U. S. 249 (1948)	5
Ramsouer v. *Midland Valley R.R.*, 135 F. 2d 101 (CCA 8, 1943)	9

Page

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944) 5

Toebelman v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 (CCA 3, 1942) 9

Walling v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (CCA 2, 1946) 7

Weisser v. *Mursam Shoe Corp.*, 127 F. 2d 344 (CCA 2, 1942) 9

Wittlin v. *Giacalone*, 154 F. 2d 20 (App. D. C. 1946) 9

Statutes and Rules:

Judicial Code, 28 U.S.C. §§ 1254(1), 2101(c) 1

Rule 50 (b), F.R.C.P. 4, 6

Rule 56, F.R.C.P. 2, 3, 4, 5, 6, 7, 8, 11

Miscellaneous:

Notes to Rules of Civil Procedure, House Doc. No. 588, 75th Cong., 3d Sess. 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 542

ANNA M. FOUNTAIN,

Petitioner,

vs.

PAUL FILSON AND ANNA F. FILSON,

Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Opinions Below

The District Court filed no opinion. The opinion of the Court of Appeals (R. 62) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered October 18, 1948 (R. 67) and on December 16 the court denied petitioner's timely motion for modification of the judgment (R. 68). The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 2101(c).

Questions Presented

1. When a District Court has granted defendant's motion for summary judgment and the plaintiff made no parallel motion, does the Court of Appeals, in reversing, have power also to direct entry of judgment for the plaintiff?

2. If such power does exist, was its exercise appropriate in this case?

Statement of the Case

Respondents filed suit against petitioner and her husband, since deceased, in the District Court for the District of Columbia (R. 2). In essence they claimed a $6,000 interest in New Jersey realty which they had conveyed to petitioner and her husband in 1937. The prayer was for the declaration of a resulting trust and incidental relief.

After answer (R. 6) and the taking of discovery depositions from petitioner's husband (R. 14) and the plaintiff Paul Filson (R. 34), petitioner moved for summary judgment under Rule 56 of the F.R.C.P. (R. 11). The sole ground for the motion was that two written instruments, the deed of conveyance and a three-year repurchase option, were controlling and did not give rise to a resulting trust under New Jersey law. Respondents made no cross-motion for summary judgment. The trial court granted petitioner's motion and rendered judgment in her favor (R. 13).

The Court of Appeals, speaking through Judge Clark, agreed that there was no resulting trust. Relying, however, on a legal theory never propounded by respondents, the court held that the written instruments were not controlling in view of the presence in the record of evidence indicating an "acknowledged indebtedness" of $6,000 from petitioner and her deceased husband to respondents. The court therefore reversed the District Court's judgment (R. 67).

The Court of Appeals did not stop there, however. It proceeded to weigh the evidence and to direct entry of judgment for respondents (R. 66, 67). Yet nowhere in its otherwise detailed opinion was there any discussion of the propriety of this direction.[1] Petitioner promptly moved for modification of the judgment on the ground that the Court of Appeals could not and should not do more than remand the case for further proceedings, but the motion was denied without opinion (R. 68).

Reasons for Granting the Writ

1. *This case raises an important question of federal procedure which has not been, but should be, settled by this Court.*

Twice in the last two Terms the Court has had occasion to consider the impact of the Civil Rules on the power of a Circuit Court of Appeals to direct entry of judgment for a party who has lost in the District Court. *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948); *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212 (1947).

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[1] The nearest the court came to this issue was in the following statement (R. 65):

> "Although we believe this to be an ill-advised suit in this jurisdiction in that it should have been instituted in New Jersey, the situs of the land, yet, having admitted personal jurisdiction over all parties, *we can and shall* [italics added] order judgment to be rendered *in personam*. . . ."

Later the court said (R. 66):

> "The court below should have found an indebtedness . . . and then rendered personal judgment against Mrs. Fountain . . . since a personal money judgment would be . . . the most effective and complete remedy possible."

From the language and the context it is clear that the first quotation concerned the jurisdiction of the District Court and the second concerned either the same question or the power of a court of equity to grant a money judgment. The court did not even mention Rule 56. The case was treated, in short, as though it had been fully tried in the District Court.

In each case the question was whether the appellate court could order judgment for a successful appellant who had failed to move for judgment notwithstanding the verdict under Rule 50(b). And in the first one, the *Cone* case, it is clear that certiorari was granted solely because of the importance of the question of federal procedure raised by the petition.[2]

The present case presents an equally important facet of the same general problem.

Rule 56[3] authorizes either or both parties to move for summary judgment on the basis of pleadings, affidavits, and depositions. Under subdivision (c) the motion must be served at least 10 days before the time fixed for the hearing, and the adverse party has until the day before the hearing to file affidavits countering the factual contentions on which the movant relies. Summary judgment is then rendered forthwith if, but only if, the papers on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Rule greatly expanded the scope of summary judgment proceedings in the federal courts. On the whole it has had a salutary effect in making possible the prompt disposal without trial of those cases in which there is no genuine issue of fact.[4] Undue expansion of the procedure,

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[2] "On three previous occasions we have granted certiorari to consider this point but failed to reach it because, upon examination of the evidence we found it sufficient to justify submission of all three cases to the jury. . . . In this case we granted certiorari 'limited to the questions of federal procedure raised by the petition for the writ.'". 330 U. S. 212, 215.

In the *Globe Liquor* case the primary reason for granting certiorari was, of course, the inconsistency between the decision of the Court of Appeals and the *Cone* case.

[3] The pertinent parts of the Rule are set forth in the Appendix to this petition.

[4] Such, of course, was its purpose. See Notes to the Rules of Civil Procedure, House Doc. No. 588, 75th Cong., 3d Sess. at 53 (1938).

however, carries with it grave dangers both for litigants and the courts. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), indicates one type of danger; the present case suggests another.

Petitioner's motion for summary judgment was based on a particular legal theory under which the only material facts concerned two written instruments. In the Court of Appeals' view, the case turned on a far different legal theory—one which had not previously been mentioned in the case and which involved facts entirely collateral to the written instruments. Respondents had not, by a motion filed at least ten days before the date of hearing, given any indication that they considered themselves entitled to summary judgment under *any* legal theory. Thus when the Court of Appeals included in its mandate directions to enter judgment for respondents, it held, by necessary implication, either (1) that petitioner, by invoking Rule 56, assumed the burden of showing the existence of a genuine issue as to facts material to a legal theory which respondents might have, but did not, advance in a cross-motion or (2) that the filing of her motion effected a waiver of her right to make such a showing.

The importance of summary judgment procedure [5] under

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[5] According to figures on file in the Administrative Office of the United States Courts for cases terminated in the fiscal year 1947, the latest year for which figures are available, motions for summary judgment were made in 353 cases. In 210 of these cases, as in the present case, the defendant alone made the motion; and in 123 of these 210, as in the present case, the motion was granted by the District Court.

These figures are based on individual case reports filed by the clerks of the various Districts Courts. The Administrative Office has informed petitioner that the reports probably fall well short of showing the full number of cases in which summary judgment was actually sought.

The Court has itself given recognition to the importance of having the summary judgment procedure clearly delineated. "The importance of questions raised under the summary judgment rule led us to grant certiorari." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 621 (1944).

the Rules makes it desirable that the Court promptly and unmistakably inform bench and bar whether a litigant may resort to Rule 56 only if willing to gamble against losing all chance of trial should the appropriate Court of Appeals decide that his legal theory is not controlling.

2. *The action of the Court of Appeals in directing entry of judgment for respondents is inconsistent with the Federal Rules of Civil Procedure and with decisions in which this Court has construed them.*

(a) *The Court of Appeals had no power to direct entry of judgment for respondents.*

So far as petitioner has been able to ascertain there is no precedent from the other circuits to sustain the Court of Appeals' action. Nor has she found a case in which any other Court of Appeals has even considered the propriety of such action. Apparently it has been taken for granted, except by the court below, that entry of judgment should not be directed unless the successful appellant has previously made the appropriate motion under Rule 56.

While the question petitioner raises has never been decided by this court, the parallel to the *Globe Liquor* and *Cone* cases, *supra*, is so close as clearly to indicate error by the court below. In both those cases it was unanimously held that the appellate court had exceeded its power when it directed judgment for an appellant who had not moved for judgment n.o.v. within 10 days after return of an adverse verdict as required by Rule 50(b). One basis for the decisions was that the Rule allowed only 10 days, a time limit which the Court would not permit to be indirectly nullified. The underlying rationale, however, was that the Rules should not be construed to give a Court of Appeals power to direct entry of judgment in situations presenting

a substantial possibility that such action would often work injustice on the other party.

In the present case, as in those cases, the respondents made no motion within the time permitted by the Rules. Under the circumstances involved in this case, moreover, an appellate court's action in directing judgment is much more likely to result in injustice than it was in either the *Cone* or the *Globe Liquor* situations. In those cases there had been full trials; and the right for which the petitioners sought protection was only the right to show the District Court that they could fill crucial gaps in their evidence if accorded a new trial. In the present case there has been no trial; and petitioner has not had the opprotunity even to show a genuine *dispute* over facts material to the controlling legal theory.

Subdivision (c) of Rule 56 in so many words appears to guarantee petitioner the opportunity to attempt such a showing by affidavits and depositions. She would undoubtedly have had that opportunity if respondents had filed a cross-motion on the acknowledged-indebtedness theory.[6] As the Second Circuit stated in *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780, 784 (1946), in which both sides had moved for summary judgment:

> ". . . although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able *and should always be allowed to show* that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."[7]

Under the decision below petitioner has lost that opportunity solely because of respondents' carelessness in not

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[6] A contrary doctrine would defeat the purpose of the Rule by discouraging summary judgment procedure. It might also raise Constitutional questions as to due process and the right to trial by jury.

[7] Italics added. See also *Begnaud* v. *White*, 170 F. 2d 323, 327 (CCA 6, 1948).

moving for summary judgment. Respondents, on the other hand, have profited by their own failure to follow the procedure contemplated by the Rules.

If the decision below is allowed to stand, its exact effect will be problematical. But the general nature of that effect is letter-clear. The element of risk and uncertainty introduced by the decision could tend only to deter cautious litigants from resorting to a motion under Rule 56. To the extent that this tendency would be translated into actuality, the decision would work against the very considerations which led this Court to approve the Rule.

(b) *Even if the Court of Appeals had power to direct judgment for respondents, exercise of that power was not appropriate in this case.*

Assuming, for purposes of argument, the existence of power to direct entry of judgment for respondents, exercise of that power should be confined to those cases in which the appellate court clearly has before it all evidence relevant to the basic question: Is there a real dispute over facts material to the controlling legal theory?

In this case there can be no doubt that the Court of Appeals did not have before it all the evidence bearing on facts basic to the acknowledged-indebtedness theory. The record did happen to contain some evidence tending to show an acknowledged indebtedness.[8] But one party to the transaction, petitioner herself, had not been heard by either affidavit or deposition. Nor had she been remiss in not submitting to the District Court her testimony to negate

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[8] Petitioner believes that the Court of Appeals misconstrued that evidence and read it without adequate regard to evidentiary discrepancies also appearing in the record. But she recognizes that the pressure of the Court's business makes it undesirable for her to stress this argument in detail.

an acknowledged indebtedness; it would have been irrelevant to the only questions before that court: Whether the written instruments were controlling and, if so, whether they established a resulting trust in favor of respondents. After the surprise decision of the Court of Appeals, moreover, petitioner hastened to assure the court that she would, if afforded an opportunity, testify, by affidavit or in person,[9] to a version of the transaction far different from that reflected in Judge Clark's opinion. She renews that assurance in this Court and states her bona fide belief that she can show, at the least, a genuine dispute over several key facts.[10]

Even where a District Court is ruling on a motion for summary judgment, it must resolve against the movant all doubts regarding the existence of a genuine issue as to a material fact. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1018 (CCA 3, 1942). On appeal from an order granting summary judgment the Court of Appeals must do likewise. *Weisser* v. *Mutsam Shoe Corp.*, 127 F. 2d 344, 346 (CCA 2, 1942).[11] The principle applies with much greater force in the present case, for here the Court Appeals was in effect ordering summary judgment for a party who had never moved for it, against a party who had had no opportunity to oppose it, and on a record which was incomplete on the crucial issue.

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[9] In either the District Court or the Court of Appeals.

[10] Among the facts which petitioner's testimony would tend to establish are clear understandings among the parties (a) that she and her husband were not to assume responsibility for payment for certain repairs effected under the respondent Paul Filson's direction and (b) that the respondents were to have no further interest in the property upon expiration of their three-year repurchase option. Both facts are highly material to the question of whether "circumstances" surrounding the transaction indicated an acknowledged indebtedness, as the Court of Appeals has held.

[11] See also *Ramsouer* v. *Midland Valley R.R.*, 135 F. 2d 101, 105-6 (CCA 8, 1943); *Wittlin* v. *Giacalone*, 154 F. 2d 20, 21-2 (App. D. C. 1946).

Conclusion

The issue petitioner raises is important, yet so simple and clear-cut that the Court could resolve it without extended argument or, indeed, any argument. Certiorari should be granted and the Court of Appeals ordered to remand the case for trial.

Respectfully submitted,

WILLIAM M. AIKEN;
CHARLES A. HORSKY,
Counsel for Petitioner.

APPENDIX

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.